Supreme Court, U.S.
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92-585

No. ____

IN THE

Supreme Court Of The United States

October Term, 1992

WILLIAM N. YEAGER, JR. and
TIMBES & YEAGER, INC.,

Petitioners,

v.

BILLY JOE CAMP,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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QUESTIONS PRESENTED FOR REVIEW

Plaintiff below (respondent herein) appealed to the Supreme Court of Alabama from a summary judgment entered in favor of defendants (petitioners herein) by the Circuit Court of Jefferson County, Alabama. The Alabama Supreme Court reversed the judgment, holding that (1) the political speech involved in this case is reasonably capable of a defamatory meaning, and (2) plaintiff presented clear and convincing evidence of actual malice sufficient to overcome defendants' motion for summary judgment. This petition presents the following questions for review:

(1) As a matter of constitutional law, can defendants' advertisement concerning a candidate for public office provide the basis for liability under state defamation law, where the ad is not objectively provable as false?

(2) Did the Alabama Supreme Court permit a forbidden intrusion on defendants' First Amendment rights in holding that plaintiff had presented clear and convincing evidence of actual malice?

PARTIES TO THE PROCEEDINGS BELOW

The parties in the court below were as follows:

1.	Billy Joe Camp	Plaintiff-Appellant
2.	William N. Yeager, Jr.	Defendant-Appellee
3.	Timbes & Yeager, Inc.	Defendant-Appellee

INFORMATION REQUIRED BY RULE 29.1

One of the two petitioners herein, Timbes & Yeager, Inc., is a corporation incorporated under the laws of the State of Alabama, having its principal place of business in Mobile, Alabama. Timbes & Yeager, Inc. is solely owned by petitioner William N. Yeager, Jr. The corporation has no parent or subsidiary companies.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

Petitioners William N. Yeager, Jr. and Timbes & Yeager, Inc. respectfully request this Court to issue a writ of certiorari to review the opinion and order of the Supreme Court of Alabama entered in this action on July 2, 1992. Petitioners further ask this Court to reverse the order of the Alabama Supreme Court and render judgment in their favor.

OPINIONS BELOW

The citation to the opinion of the Supreme Court of Alabama is 601 So.2d 94 (Ala. 1992). A copy of the opinion is reproduced in the Appendix hereto at pages A-1-A-23. The decision of the trial court is reproduced in the Appendix at pages A-24-A-26.

JURISDICTION

The order sought to be reviewed was entered by the Alabama Supreme Court on July 2, 1992. The petition for writ of certiorari is being filed within 90 days after entry of the Alabama Supreme Court's order reversing the judgment of the trial court. The jurisdiction of this Court thereby is invoked pursuant to 28 U.S.C. § 1257(a).

FEDERAL CONSTITUTIONAL PROVISION INVOLVED

This case involves the First Amendment to the Constitution of the United States, which states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." The First Amendment is applicable to the States through the Fourteenth Amendment, which provides in part: "No state shall . . . deprive any person of life, liberty or property, without due process of law. . . . "

STATEMENT OF THE CASE

Petitioner William N. Yeager, Jr. is the owner and president of an advertising firm, petitioner Timbes & Yeager, Inc., in Mobile, Alabama (hereinafter collectively referred to as "Yeager"). Yeager was the media consultant to incumbent Perry Hand (hereinafter "Hand") and his campaign staff during the 1990 election campaign for the Alabama Secretary of State's office (R.31).[1] Hand's opponent in the election was respondent Billy Joe Camp (hereinafter "Camp"). Approximately one month before the election, Hand's campaign ran

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[1] References herein of "R.___" are to pages of the record on appeal to the Alabama Supreme Court. References to "___ depo." refer to deposition transcripts, which were before the court on appeal (R.118), but were not separately paginated.

a political advertisement on several television stations across the state. The ad stated that there were three utility rate increases during Camp's prior tenure as president of Alabama's Public Service Commission ("Commission"). The ad then stated: "As a reward, Georgia Power paid him [Camp] over 700 Thousand Dollars in consulting fees."[2] It is uncontested that after Camp left office, the Georgia Power Co. (an affiliate of the Alabama Power Co.) paid Camp's company more than $770,000 in consulting fees over a three year period (R. 36-37, 57-58).

Yeager was largely responsible for creating the political advertisement. He based the ad upon information from two published news articles sent to him by Hand's campaign (R.31, 36-37; Yeager depo. 20-23). The information first appeared in *Bill Shipp's Georgia*, an Atlanta political newsletter (R.37, 109). The same information was republished again in an Associated Press report in *The Montgomery Advertiser*. This news report reads in part:

> Billy Joe Camp, former president of the Alabama Public Service Commission and a Democratic candidate for secretary of state, received more than $770,000 in consulting fees from Georgia Power Co. during a three year period, an Atlanta-based newsletter reported Monday.
>
> * * *
>
> As head of the Alabama PSC, Camp helped regulate Alabama Power Co. which — like Georgia Power — is a subsidiary of the Southern Co.

(R.36). Yeager also relied on material from the Hand campaign which noted that although the Commission initially disapproved the increases requested by Alabama Power Co., the rate cases were remanded by the Alabama Supreme Court and settled by the Commission under a ratemaking methodology known as rate stabilization and equalization (R.38).

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[2] The full script of the ad appears on page 4, *infra*.

The ad was taped in a cemetery; its theme was Hand's effectiveness in curbing election fraud by removing the names of deceased persons from the voting rolls:

> [Perry Hand]: **Since becoming Secretary of State, I've been working to keep these folks from voting.**
>
> [Voice over]: **While Perry Hand's been fighting to clean up the voters list and curb election fraud, what's his opponent done?**
>
> **When Billy Joe Camp was president of the Public Service Commission, we got hit with three rate increases. As a reward, Georgia Power paid him over 700 thousand dollars in consulting fees. A clear choice, Perry Hand, a tough secretary of state who's cracking down on corrupt politics.**

(R.35).[3]

One month after the campaign ad aired, on election day, November 6, 1990, Camp instituted this libel action in the Circuit Court of Jefferson County, Alabama against Yeager, Hand, and Hand's campaign chairman. Camp won the election by a large margin.

Yeager raised his constitutional defenses in his answer to the complaint, and thereafter filed a motion for summary judgment on February 14, 1991 (R.90-91). On October 4, 1991, after argument and review of the materials submitted both in support and in opposition, the trial court granted the motion (A-24-27). Camp appealed the grant of summary judgment to the Alabama Supreme Court (R.122-25).

On appeal, the Alabama Supreme Court, over one Justice's dissent, reversed. The court noted that whether the campaign ad was reasonably capable of a defamatory meaning is a question of law (A-3). Without analysis, the court concluded that

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[3] Camp has never alleged that the reference to "corrupt politics" refers to him. Indeed, the portion of the ad alleged in the complaint to be defamatory expressly excludes the last phrase of the ad (A-23-24). Camp's complaint is reproduced in the Appendix hereto at pages A-22 to A-26.

the ad was reasonably capable of a defamatory meaning (A-4). The court held that, under the "common mind" concept, a factual question was presented as to whether Hand's political remark about his opponent could be interpreted as an accusation of corrupt or criminal conduct (A-4). The court also ruled that Camp had presented sufficiently clear and convincing evidence of actual malice to create a genuine issue of material fact (A-6). From this decision, entered on July 2, 1992, this petition followed.

REASONS FOR GRANTING THE WRIT

I. The Alabama Supreme Court's Holding That The Political Advertisement Can Be Interpreted As Defamatory Conflicts With The Decisions Of This Court.

The decision of the Alabama Supreme Court warrants this Court's review, first, because it squarely conflicts with binding precedent interpreting the First Amendment. The court below held that the political advertisement at issue was reasonably capable of a defamatory meaning. It so held without analysis of whether the advertisement is "sufficiently factual to be susceptible of being proved true or false . . . on a core of objective evidence." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, ___, 111 L.Ed. 2d 1, 19 (1990). The court avoided altogether Yeager's contention that the "as a reward" phrase cannot be viewed as "'an articulation of an objectively verifiable event,'" as required by *Milkovich*. *Id.* at ___, 111 L.Ed. 2d at 20 (quoting *Scott v. News-Herald*, 25 Ohio St. 3d 243, 252, 496 N.E.2d 699, 707 (1986)).

It is plain that Camp's libel claim cannot, consistent with this constitutional standard, be submitted to the jury for resolution. The campaign ad recites truthfully that three utility rate increases took effect while Camp was president of the Commission, and also recites truthfully that Georgia Power Co. later paid Camp more than $700,000 in consulting fees. The ad connects these truthful factual assertions with the phrase "as a reward." It is at once apparent that the connect-

ing phrase, and the sentiment it conveys, cannot be proven true or false by a core of objective evidence, and does not describe an objectively verifiable event. Rather, the phrase describes the motivation of Georgia Power Co. in retaining Camp's consulting services, under circumstances which suggests a questionable conflict of interest. Not only is the phrase fair comment on candidate Camp's conduct, it is simply not possible to prove or disprove *objectively* that the utility chose to "reward" Camp for his service on the Commission or for the rate increases. In order to find falsity, the jury must look into the minds of Georgia Power officials to determine their motivation. Such a finding depends not upon what any party did, but upon a subjective, after-the-fact explanation of *why* a party did what it did. The reasons for Georgia Power's decision to retain Camp are not objectively verifiable, and the Alabama Supreme Court erred in failing to so recognize. *Cf. Janklow v. Newsweek, Inc.*, 788 F.2d 1300, 1304 (8th Cir. 1986) (defendant's statement that attorney general had prosecuted case out of a sense of personal revenge is not verifiable; "the singling out of impermissible motive is a subtle and slippery enterprise, particularly when the activities of public officials are involved.").

The court below, in holding that the advertisement reasonably implied an accusation of corruption, likewise failed to follow this Court's decision in *Greenbelt Cooperative Publ. Ass'n. v. Bresler*, 398 U.S. 6 (1970). There, the Court held that a description at a public meeting of a real estate developer's conduct as "blackmail" and a "blackmailing scheme" was not constitutionally actionable as defamation, as no reasonable reader "could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging [the plaintiff] with the commission of a criminal offense." *Id.* at 14. Here, given the context of the ad in the midst of a heated statewide political race, and the clear potential for conflict of interest inherent in Camp's relationship with the utility companies, no reasonable viewer could have concluded that "as a reward" implied a prior agreement

to employ Camp in exhange for rate increases and, hence, signalled bribery or corruption.[4]

Even assuming *arguendo* that the campaign ad is capable of being proven defamatory under one interpretation, the ad also clearly is susceptible of rational, non-defamatory constructions. Although Yeager denies that the phrase "as a reward" is reasonably capable of connoting bribery or corruption, only one strained construction of the phrase could impart such an implication. *See* A-14 (Maddox, J., dissenting) ("To make this finding, the Court must engage in a laboratory analysis of the commercial and decide that the words "as a reward" are defamatory.") Certainly an Alabama jury reasonably could find that the campaign ad implied only a question about the propriety of Camp's acceptance of large monetary payments from Georgia Power, given his prior position as a regulator over Georgia Power's sister corporation.[5] This potential disparate treatment of speech relating to a candidate in a political campaign is impermissible where, as this Court has observed in a related context, "adoption of the language chosen was 'one of a number of possible rational interpretations' of an event . . . " *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 512 (1984) (quoting *Time, Inc. v. Pape*, 401 U.S. 279, 290 (1971)).[6]

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[4] Indeed, as the dissenting opinion below correctly notes, any innuendo or implication raised by the ad is the same as the innuendo or implication created by the newspaper articles which previously had disclosed the same essential facts as contained in the ad.

[5] Such an implication clearly would be protected under the First Amendment. "It is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages." *New York Times Co. v. Sullivan*, 376 U.S. 254, 281 (1964) (citation omitted); *see also Hustler Magazine v. Falwell*, 485 U.S. 46, 51 (1988) ("the sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those who hold public office. . . . ").

[6] The decision below conflicts with a number of lower court opinions, both before and after *Milkovich*, that have recognized the impossibility of proving or disproving the content of words that are inherently ambiguous. *See Phantom Touring, Inc. v. Affiliated Publications*, 953 F.2d 724, 728 (1st Cir.

The lower court's error is of grave significance given the context — discussion by one candidate of his opponent's qualifications and fitness — in which the challenged speech was made. This Court's "First Amendment decisions have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position. . . . " *R.A.V. v. City of St. Paul, Minnesota*, ___ U.S. ___, 120 L. Ed. 2d 305, 355 (1992) (Stevens, J., concurring in the judgment). If not remedied by this Court, the erroneous decision below threatens to saddle political candidates with the burden of carefully surmising beforehand all possible connotations and interpretations of their speech, lest a jury do it for them later. Such a result is palpably at odds with First Amendment jurisprudence. *See, e.g., Time, Inc. v. Hill*, 385 U.S. 374, 406 (1967) (Harlan, J., concurring in part and dissenting in part) ("[I]n many areas which are at the center of public debate, 'truth' is not a readily identifiable concept, and putting to the preexisting prejudices of a jury the determination of what is 'true' may effectively institute a system of censorship"); *New York Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964) (" 'Cases which impose liability for erroneous reports of the political conduct of officials reflect the obsolete doctrine that the governed must not criticize their governors. . . . ' ") (quoting *Sweeney v. Patterson*, 128 F.2d 457, 458, *cert. denied*, 317 U.S. 678 (1942)).[7] Because the Alabama

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1992) (description of a musical-comedy show as "fake" and "phony" held unprovable, "since those adjectives admit of numerous interpretations"); *Gouthro v. Gilgun*, 427 N.E.2d 1166, 1168 (Mass. App. Ct. 1982) (allegedly libelous comments by a mayoral candidate about his opponent held to be "susceptible of more than one interpretation" and "too vague to be cognizable as the subject of a defamation action.") (citation omitted); *see also Janklow v. Viking Press*, 459 N.W.2d 415, 423 (S.D. 1990); *McCabe v. Rattiner*, 814 F.2d 839, 842 (1st Cir. 1987); *Catalfo v. Jensen*, 657 F. Supp. 463, 468 (D.N.H. 1987).

[7] *See also Woods v. Evansville Press Co., Inc.*, 791 F.2d 480, 487-88 (7th Cir. 1986) ("A publisher reporting on matters of general or public interest cannot be charged with the intolerable burden of guessing what inferences a jury might draw from an article and ruling out all possible false and defamatory innuendoes that could be drawn from the article.").

Supreme Court effectively disregarded federal constitutional rulings of this Court, certiorari should be granted.[8]

II. The Alabama Supreme Court Failed To Afford This Political Speech The Heightened Constitutional Protection Mandated By The Actual Malice Rule.

The writ should issue also because the Alabama Supreme Court failed to recognize this Court's decisions which afford protection to allegedly defamatory speech where there is no clear and convincing evidence of actual malice. The trial court in its summary judgment order, citing *New York Times* and its progeny, found that Camp could not show actual malice by clear and convincing evidence (A-20). The trial court ruled that even if Yeager "made a mistake in interpreting documents or events," the evidence remained that "Yeager believed the statements and opinions in the television spot, and relied in making them upon articles carried by the Associated Press." (A-20). Consequently, Camp could not show that Yeager's statements "were made with knowledge of their

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[8] In addition, the writ should issue to settle confusion in the lower courts as to whether *Milkovich* overruled preexisting case law on what constitutional protection may be afforded statements of opinion as opposed to statements of fact. *Compare, e.g., Unelko Corp. v. Rooney*, 912 F.2d 1049, 1053 (9th Cir. 1990), *cert. denied*, 113 L.Ed.2d 650 (1991) (holding that pre-*Milkovich* opinion cases have been "effectively overruled" and that "the 'opinion' test . . . is now obsolete."), *White v. Fraternal Order of Police*, 909 F.2d 512, 522 (D.C. Cir. 1990) (*Milkovich* "rejected the practice, developed by the lower courts, of applying a strict dichotomy between assertions of fact and assertions of opinion"), and *Gross v. New York Times Co.*, 20 Media L. Rep. 1274, 1275 (N.Y.S. Ct., App. Div. 1992) ("The Supreme Court has [in *Milkovich*] restricted the concept of absolutely protected pure opinion in federal jurisprudence."), with *Hunt v. University of Minnesota*, 465 N.W.2d 88, 94 (Minn. Ct. App. 1991) (the "test used by *Milkovich* to identify protected opinions is very similar to the four-factor inquiry used by the Circuit Courts to distinguish fact from opinion."), and *Kimura v. Superior Court*, 281 Cal. Rptr. 691, 696 (Ct. App. 1991) ("It has been recognized that *Milkovich* does not change substantive law in this area."). *See generally*, R. Vanderet et al., "Media Law and Defamation Torts: Recent Developments," 27 *Tort & Ins. L. J.* 333, 339-43 (1992) (analyzing impact of *Milkovich* on lower courts).

falsity or with reckless disregard as to their truth or falsity." (A-20) (citing *Time, Inc. v. Pape*, 401 U.S. 279 (1971) and *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984)). When the Alabama Supreme Court reversed the trial court's judgment, it professed to "traipse through the maze" (A-4) of this Court's decision in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). However, it is clear that the court below did not apply the protective constitutional standard required by *Anderson* and other decisions of this Court in any meaningful manner.

When ruling on a motion for summary judgment, the clear and convincing evidentiary burden provides the qualitative and quantitative test for the sufficiency of the evidence. *Anderson*, 477 U.S. at 254. The trial judge must ascertain whether plaintiff has presented evidence sufficient to support a jury's finding that actual malice has been proven with "convincing clarity." *Id.* at 257. Paying lip service only to this heightened burden of proof, the Alabama Supreme Court stated only that Camp had presented clear and convincing evidence that Yeager "knew that the statement, as understood, was false." (A-6). The court below substituted its own "common mind" understanding that the ad imputes dishonest or criminal conduct for the state of mind Yeager actually possessed. Yet, the court offered no explanation as to how Yeager could or should have known that the "as a reward" language imputed the false factual connotation that Camp and Georgia Power had a prior arrangement to pay Camp consulting fees in return for rate increases.[9]

The first fundamental flaw in the lower court's holding is the tacit finding that Yeager *could* have known the campaign ad was false. As Yeager contends *supra*, his conclusory belief

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[9] "The requirement of independent appellate review reiterated in *New York Times Co. v. Sullivan* is a rule of federal constitutional law. . . . It reflects a deeply held conviction that judges — and particularly Members of this Court — must exercise such review in order to preserve the precious liberties established and ordained by the Constitution." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 510-11 (1984).

in Georgia Power's ulterior motive cannot be proven false in the first instance. "'The constitutional protection does not turn upon the truth, popularity, or social utility of the ideas and beliefs which are offered.'" (A-16) (Maddox, J., dissenting) (quoting *New York Times Co. v. Sullivan*, 376 U.S. at 271). Second, there is no *clear* and *convincing* evidence either that Yeager "knew" his "as a reward" conclusion was false, or that he possessed a "high degree of awareness of . . . probable falsity." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964)).

The record before the trial court overwhelmingly eliminates any inference that Yeager knew the ad was false or that he recklessly disregarded whether it was true or false. Yeager did not fabricate the point that utility rates increased three times during Camp's tenure on the Commission. Yeager did not simply imagine that Georgia Power paid Camp an inordinate amount of money for consulting services. Yeager did not concoct the affiliation between Georgia Power Co. and Alabama Power Co. Yeager simply and quite understandably viewed each one of these publicly-known facts concerning his client's opponent as supportive of his belief that Georgia Power paid these consulting fees to Camp "as a reward."

There was nothing in the record which would indicate in any way that Yeager had reason to doubt the ad's accuracy; indeed, the evidence was to the contrary. For example, the evidence showed that Hand's campaign chairman questioned Yeager about the language employed in the ad *before* it was broadcast. In response to the inquiry, Yeager expressed his view as to the ad's truthfulness:

> Q. What was his [Yeager's] response?
>
> A. He said he was not suggesting in the commercial that Mr. Camp had done anything illegal or improper, that he was setting out two facts in the commercial.

(Edwards depo. 39-40).

Yeager firmly believed that the language he employed was

fair and truthful when the ad was broadcast, and he continues to hold that belief today. Although Yeager knew the Commission initially denied the requested rate increases (R.38), Yeager did not know whether Camp himself voted for or against the requests (R.38, Yeager depo. 58). Yeager believed that the significance of the $389,000,000 in rate increases during Camp's "watch" on the Commission fully supported his comment on the consulting contracts (R.33). The following testimony of Yeager is insightful:

> Q. Is it your testimony that these three words "as a reward" are not related, are not meant to imply that he received those consulting fees for the rate increases?
>
> A. No, sir. I didn't say that he voted for them. I just said while he was on there. He was on The Public Service Commission. As a result of his being on there, as a reward, he received those consulting contracts. Yes, sir, that was what I intended to say and that's what we said and that's what I believe.

(Yeager depo. 59).

Camp's failed effort in the deposition to make Yeager agree with the implication that Georgia Power and Camp had a prior agreement to increase utility rates in exchange for consulting contracts reflects the futility of arguing inferences which are not, and cannot be, proven by any objective evidence. Yeager's choice of words, though possibly a "misconception" of events in Camp's eyes, does not intimate in any way that Yeager consciously disregarded any fact or circumstance which conflicts with his expressed belief. Without such evidence, as this Court has held in very similar cases discussed below, Camp cannot satisfy the actual malice test of *New York Times*.

In *Time, Inc. v. Pape*, 401 U.S. 279 (1971), a magazine published an article which reported details of police brutality as if the charges constituted actual findings of a civil rights commission investigating the charges, when, in reality, the

charges were taken from the complaint lodged by the victims of the alleged brutality. The defendant magazine acknowledged that the wording of the commission's report had been altered significantly, but it also maintained that the real meaning of the report had not been changed. *Id.* at 285. This Court held that the alteration of the commission's report did not amount to a "falsification" which might support a finding of actual malice. *Id.* at 289. Further, even with the alteration, the article offered a "possible rational interpretation" which, even if "deliberate" and "arguably reflecting a misconception," still was insufficient to create a triable issue of fact under *New York Times*. *Id.* at 290.

Similarly, in *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81 (1967), plaintiff alleged that during his campaign for public office, he was libeled by a newspaper editorial which stated that plaintiff was "able to intimidate" another person. *Id.* at 83-84. Plaintiff argued that since the article's author failed to investigate the charge, and because plaintiff and the other person denied the charge, there was evidence of a reckless disregard for the truth of the article's assertion. The newspaper's representative admitted the absence of any investigation, but also testified that the newspaper believed in the "possibility" that intimidation had occurred, which was "as near the facts and truth as we could get." *Id.* at 84. This Court concluded that the evidence failed to reveal "'the high degree of awareness of . . . probable falsity demanded by *New York Times*.'" *Id.* (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964)).

Yeager's belief that the consulting fees were a reward, as expressed in the campaign ad, was plainly a rational interpretation of, and a fair comment upon, Camp's dealing with the utilities. This type of expression, as was the holding in *Pape*, cannot support a finding of actual malice. Moreover, Yeager is in the same position as that of the defendant in *Hanks*, because the "as a reward" comment is "as near the facts and truth" as anyone could get. It was not possible for Yeager to ascertain, before or after the ad was broadcast, the subjective motive and intent of Georgia Power officials in awarding lu-

crative contracts to Camp. Camp simply has not and cannot show on this record that Yeager had the "high degree of awareness of probable falsity" required by this Court's decisions.

Yeager's campaign ad also is similar to the political speech at issue in *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971). In *Monitor Patriot*, a newspaper editorial characterized a candidate for the United States Senate as a "former small-time bootlegger." *Id.* at 266. Reversing a judgment for plaintiff due to the absence of the *New York Times* standard from the trial court's jury instructions, this Court noted that the public benefit arising out of the constitutional protection of speech and press "has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Id.* at 272. This Court expounded on the *New York Times* standard: "The considerations that led us to reformulate the "official conduct" rule of *New York Times* in terms of 'anything which might touch on an official's fitness for office' apply with special force to the case of the candidate." *Id.* at 274.[10] *See also St. Amant v. Thompson*, 390 U.S. at 731 (where political candidate charged that "money ... had passed hands" to plaintiff, a public official, it was not established that defendant "in fact entertained serious doubts as to the truth of his publication.")

Moreover, the Alabama Supreme Court appears to have relied upon the definition of common law malice when it ruled that "[t]he issue of actual malice on the part of the defendants seems peculiarly inappropriate for disposition by summary judgment because it concerns 'motive, intent, and subjective feelings and reactions.'" (A-8) (quoting *Loveless v. Graddick*, 325 So.2d 137, 143 (Ala. 1975) and *Goldwater v.*

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[10] This heightened concern, of course, rests in part upon the fact that the election process occurs in the "hardy climate" of public debate, where "'[c]harges of gross incompetence, disregard of the public interest, communist sympathies, and the like have filled the air' and 'hints of bribery, embezzlement, and other criminal conduct are not infrequent.'" (A-15) (Maddox, J., dissenting) (quoting *New York Times*, 376 U.S. at 273).

Ginzburg, 261 F.Supp. 784 (S.D.N.Y. 1966), *aff'd*, 414 F.2d 324 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970)). If the Alabama Supreme Court meant that actual malice is provable by the defendant's motive and other subjective feelings concerning the plaintiff, then the holding is contrary to *New York Times*. "Actual malice under the *New York Times* standard should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will." *Masson v. New Yorker Magazine, Inc.*, 501 U.S. ___, ___, 115 L. Ed. 2d 447, 468 (1991). *See also Hanks*, 389 U.S. at 82 (jury instruction on "bad or corrupt motive," "personal spite" and "ill will" was misstatement of the law under *New York Times*). If the Alabama Supreme Court intended instead that knowledge of truth or falsity requires that the jury probe the defendant's subjective belief in the truth of his statement, so that summary judgment is rarely appropriate, then this finding effectively eviscerates the First Amendment protection supposedly afforded by the clear and convincing evidentiary standard.

CONCLUSION

For the foregoing reasons, petitioners request that the Court issue a writ of certiorari to review the judgment and opinion of the Supreme Court of Alabama, reverse that judgment, and reinstate the judgment of the trial court.

Respectfully submitted,

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September 30, 1992

APPENDIX

RELEASED
July 2, 1992

SUPREME COURT OF ALABAMA

SPECIAL TERM, 1992

1910255

Billy Joe Camp

v.

William N. Yeager, Jr., and Timbes & Yeager, Inc.

Appeal from Jefferson Circuit Court
(CV-90-8590)

INGRAM, JUSTICE.

The plaintiff, Billy Joe Camp, appeals from a summary judgment in favor of defendants William N. Yeager, Jr., and Timbes & Yeager, Inc., in a defamation action.

In the 1990 election for secretary of state, Camp, the Democratic Party's nominee, faced Perry Hand, the Republican Party's nominee. Hand had employed Yeager of the Mobile advertising firm Timbes & Yeager, Inc., as his media consultant. Yeager wrote and produced a television commercial that is at issue in this case.

The commercial opened with Hand standing in a cemetery and consisted of the following text:

> "[Hand]: Since becoming secretary of state, I've been working to keep these folks from voting.
>
> "[Voice over]: While Perry Hand's been fighting to clean up the voters' list and curb election fraud, what's his opponent done? When Billy Joe Camp was president of the Public Service Commission, we got

> hit with three rate increases. As a reward, Georgia Power paid him over 700 thousand dollars in consulting fees. A clear choice. Perry Hand — a tough secretary of state who's cracking done on corrupt politics."

The commercial was broadcast several times during the week of October 2-9, 1990, on television stations in Birmingham, Huntsville, Mobile, and Montgomery.

Camp has served as president of the Public Service Commission ("PSC") in the early 1980s. During that time, Alabama Power Company received three rate increases. Camp voted against each rate increase request by Alabama Power; however, those rates increases were granted pursuant to orders of this Court.

Sometime after Camp left the PSC, he started a consulting firm. He entered into an agreement with Georgia Power Company to perform economic development work, labor relations consulting, and consulting on public relations and regulatory affairs pertaining to nuclear generation of electric power. Camp's firm received payments in excess of $700,000 for these services. On May 14, 1990, an article appeared in the publication *Bill Shipp's Georgia* revealing the payments. The article was based on information from the annual filings of Georgia Power Company.

Shortly after the November election, Camp brought this action alleging defamation. The complaint sought compensatory and punitive damages for the malicious publication of false statements that Camp alleged were contained in the television commercial. The complaint sought damages from four defendants: Yeager; Timbes & Yeager, Inc.; Hand; and Jack Edwards, chairman of Hand's campaign.

Yeager and Timbes & Yeager filed a motion for summary judgment. The trial court granted the motion, and the judgment was made final pursuant to Rule 54(b), A.R.Civ.P. Camp appealed.

On appeal Camp raised two issues: (1) whether the television commercial contained an actionable defamatory state-

ment; and (2) whether Camp produced sufficient evidence of actual malice to withstand the appellees' motion for summary judgment.

Actionable Statement

A summary judgment is appropriate upon a showing that no genuine issue of material fact exists and that the moving party is entitled to a judgment as a matter of law. Rule 56, A.R.Civ.P. In reviewing a summary judgment, this Court will view the evidence in the light most favorable to the nonmovant and will resolve all reasonable doubts against the movant. *Fincher v. Robinson Bros. Lincoln-Mercury, Inc.*, 583 So. 2d 256 (Ala. 1991).

Whether a communication is reasonably capable of a defamatory meaning is, in the first instance, a question of law. *Harris v. School Annual Publishing Co.*, 466 So. 2d 963, 964 (Ala. 1985). "Thus, if the communication is not reasonably capable of a defamatory meaning, there is no issue of fact, and summary judgment is proper." *Id.* at 964-65. However, if the trial court finds that the statement is reasonably capable of a defamatory meaning, "it is then for the jury to say whether [the statement was] in fact so understood." W. Page Keeton, et al., *Prosser and Keeton on Torts* § 111, at 781 (5th ed. 1984).

The test to factually determine the defamatory nature of a statement is that meaning that would be ascribed to the language by a reader or listener of "average or ordinary intelligence, or by a common mind." *Loveless v. Graddick*, 325 So. 2d 137, 142 (Ala. 1975). In determining whether the television commercial at issue was libelous,[1]

> "[its] actionable character is to be taken in [its] natural meaning according to the sense in which [it] appears to have been used, and the idea [it] convey[s] to those who heard and saw [it]. [It is] not to be

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[1] Broadcasting of defamatory matter by means of radio or television is libel. *See* Restatement (Second) of Torts § 568A (1966); *see, e.g., Gray v. WALA-TV*, 384 So. 2d 1062, 1065 (Ala. 1980).

> measured by [its] effect when subjected to the critical analysis of a trained legal mind, but must be construed and determined by [its] natural and probable effect upon the mind of the average television viewer."

Gray v. WALA-TV, 384 So. 2d 1062, 1065 (Ala. 1980).

If the words employed in the allegedly libelous publication are understood to impute dishonesty or corruption to an individual, they are actionable. *Id.*

Taking the television commercial in its entirety, this Court holds that the television commercial was reasonably capable of a defamatory meaning. Also, after reviewing the entire record, we find that a genuine issue of material fact was presented as to whether such a defamatory meaning was understood.

Actual Malice

Since *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), it has been clear that the First Amendment requires that, to be actionable, an alleged defamatory statement by a defendant against a public official (now public figures) must be made with actual malice. The present law is equally clear that such actual malice must be shown with "convincing clarity." Since *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), "clear and convincing" has been the standard mandated not only to the jury sitting for this type of case, but to the trial judge as well in his determination of the defendant's motion for summary judgment. So, we must look to a standard higher than substantial evidence in the present case, because it is written that the First Amendment requires it. We, therefore, leave our substantial evidence test used for summary judgment in most other cases so that we might apply that higher standard in this case.

A close reading of *Anderson v. Liberty Lobby, Inc.*, or, perhaps more appropriately, a "traipsing through the maze," will, we hope, lead to an understanding of the essential requirements and their application to the present case.

The principal requirement of a plaintiff if he is to survive a properly supported motion for summary judgment is that he must satisfy the trial judge that there is a *genuine* issue of *material* fact. The substantive law of the case must be utilized by the trial judge to aid him in determining whether there are critical facts to be determined, disputed facts that could affect the decision of a jury; yet the role of the substantive law must be for the purpose of identifying to the trial judge those facts that are critical to the case.

A trial judge is not required "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial," *id.* at 251, nor is there any requirement for him to make a finding of fact.

In reversing the summary judgment, we are satisfied that there are facts that are critical to a proper resolution of this case, a resolution that can be made only by a finder of fact — a jury. We find support for our determination within the following language from *Anderson*: "The inquiry performed is the threshold inquiry of determining whether there is the need for a trial — whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Id.* at 250.

The parties agree that Camp is a public figure and as such cannot recover for libel unless he offers proof that the libelous publication was made with "actual malice." See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). The term "actual malice" is "synonymous with, *and only with*, 'knowledge of falsity or reckless disregard of truth or falsity.'" *Mobile Press Register, Inc. v. Faulkner*, 372 So. 2d 1282, 1287 (Ala. 1979) (emphasis in original). Therefore, a false and defamatory statement may be made purposefully and with ill will toward the public figure, and yet the law refuses the public figure a remedy if the statement was made without knowledge of the falsity or without reckless disregard of its truth or falsity. *Id.* The rationale for this rule is:

> "Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth."

Id. (quoting *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964)).

On the particular issue of actual malice in this case, we have looked at the evidence in the record, viewing the evidence in the light most favorable to the nonmovant, Camp, and allowing all reasonable inferences from that evidence, to determine whether the trial court correctly found that Yeager and Timbes & Yeager were entitled to a summary judgment based on the issue of actual malice.

In addition to these tests, we have also examined the evidence in search of a genuine issue involving material facts; and we have considered whether those facts are critical; whether they are in dispute on the issue of actual malice; and whether they are facts that can the fairly resolved only by a jury. We have assessed the trial judge's view of the above matter within the framework of the "clear and convincing" standard. We are now compelled to conclude that the trial judge erred when he granted Yeager and Timbes & Yeager's motion for summary judgment.

We are satisfied that Camp has presented evidence, that, if believed by a jury, would be sufficient to support a finding, by clear and convincing evidence, that Yeager knew that the statement, as understood, was false.

The Benchmarks

The facts or happenings of this case are largely undisputed. A political campaign was underway; the political advertisement was aired on four television stations in this state; and, most importantly, the statements of the advertisement are without dispute. There are, however, two important factual disputes that a jury must determine in this case: (1) whether the state-

ment was understood as imputing some sort of corrupt conduct to Camp; and (2) whether, if a jury finds that the statement was understood as imputing corrupt conduct to Camp, Yeager knew that such an imputation was false. The first factual dispute must be resolved by determining the "meaning that would be ascribed to the language by a reader or listener of ordinary or average intelligence, or by a 'common mind,'" *Loveless v. Graddick*, 325 So. 2d 137, 142 (Ala. 1975), and is not to be determined by "critical analysis of a trained legal mind," *Gray v. WALA-TV*, 384 So. 2d 1062, 1065 (Ala. 1980).

The "common mind" concept is the conduit that carries this case through the summary judgment stage to the jury for resolution. The value of the statement as suggesting corrupt conduct must be measured by "common mind" jurors, as opposed to a trained legal mind. This is so because political statements, if they are to be effective, must be designed to appeal to the general public, the citizens — the voters — in an effort to persuade them that the thrust of the statements is true or has merit, either favorable to the candidate who makes those statements or unfavorable to his opponent.

We have no hesitancy to excerpt certain language from *Anderson*, language that we perceive supports out conclusion that this case should be presented to a jury:

> "Our holding that the clear and convincing standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a

> case where there is reason to believe that the better course would be to proceed to a full trial."

Id. at 255 (citations omitted).

The determination of whether the summary judgment here should be denied on the issue of actual malice is whether the evidence in the record could support a jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not.

Finally, we note, as an earlier Court noted:

> "'The issue of actual malice on the part of defendants seems peculiarly inappropriate for disposition by summary judgment because it concerns "motive, intent, and subjective feelings and reactions."'"

Loveless, 325 So. 2d at 143 (quoting *Goldwater v. Ginzburg*, 261 F. Supp. 784 (S.D.N.Y. 1966), *aff'd*, 414 F.2d 324 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970)). For reasons indicated, not the least of which is the necessity of a jury's opportunity to weigh and determine credibility and subjective intent, we find this case uniquely suited for presentation to a jury. We, therefore, determine that the factual disputes here should be presented to a jury for decision pursuant to the "clear and convincing" evidence standard mandated by the current law.

The summary judgment entered in favor of Yeager and Timbes & Yeager is reversed, and this cause is remanded to the trial court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Hornsby, C.J., and Shores, Adams, and Steagall, JJ., concur.

Houston, J., concurs specially.

Maddox, J., dissents.

HOUSTON, JUSTICE (concurring specially).

In the June 22, 1992, issue of *The New Yorker*, at page 28, a cartoon depicts a robed judge on the bench, with fingers touching and a pontificating smile, who says: "Call it 'legislating from the bench,' if you will, but on this occasion I should like to repeal the First Amendment."

After reading Justice Maddox's excellent dissent, as one who is voting with the majority, I felt like a fellow traveler with the judge in the aforementioned satirical drawing. I write to address Justice Maddox's dissent.

Does *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), protect the publication of known lies about a political opponent made for the sole purpose of gaining a political advantage? If it does, my vote is wrong. *New York Times* protects debate on public issues that is "uninhibited"[2] ("Not inhibited; open. . . . Free from the expected social or moral constraints"); "robust" ("vigorous; hardy, boisterous, rough"); "wide-open" ("Opened completely. . . . Without laws or law enforcement"); "vehement" ("Characterized by forcefulness of expression or intensity of emotion, passion, or conviction; ardent; emphatic. . . . Marked by or full of vigor or energy; strong; violent"); and "caustic" ("Marked by sharp and bitter wit; cutting"). *New York Times* protects debate that uses "unpleasantly sharp attacks." 376 U.S. at 270.

I am aware of the statement that "[t]he constitutional protection does not turn upon 'the truth . . . of the ideas and beliefs which are offered.'" 376 U.S. at 271. But does this not merely protect a defamatory untruth made without actual malice? Yes. How can actual malice be proven? By proof that the false defamatory statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 280.

To me, the holding in *New York Times* is this: "[T]here was no evidence whatever that [*New York Times* was] aware of any

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[2]All definitions are from *The American Heritage Dictionary of the English Language* (1969).

erroneous statements or [was] in any way reckless in that regard. The judgment against the New York Times Company is thus without constitutional support." 376 U.S. at 286.

In the case at issue, there is clear and convincing evidence of actual malice. This, in my opinion, distinguishes this case from *New York Times*. Therefore, the trier of fact should determine whether the television commercial was defamatory, untrue, and made with knowledge of the falsity or with a reckless disregard of whether it was false or not.

The First Amendment does not make a person who seeks public office a pariah. The First Amendment is not at odds with Truth; the First Amendment was promulgated by our forebears to ensure that Truth will out.

MADDOX, JUSTICE (dissenting).

The majority's decision, which permits the continued prosecution of this action, is wrong. It is wrong, based, at least, on these reasons:

> (1) The television commercial that is the subject matter of this action was a form of core political speech that enjoys *the highest, most protected position of any speech*, and the majority has failed to grant it First Amendment protection, as required by the principles of law announced in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); and
>
> (2) There are no fact questions for a jury to decide, because the plaintiff has failed to offer clear and convincing evidence that the defendant acted with actual malice; therefore, the summary judgment was appropriate, and indeed, was required under the principles of law announced in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

Because the Court fails to apply the principles of First Amendment law that are uniquely applicable to this case, I must respectfully dissent.

The issue presented here — whether allegedly false and defamatory speech about a public official or political candidate is protected speech — is not a new one. It was decided 28 years ago, when the Supreme Court of the United States, in the landmark case of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), established a new rule to be applied in such cases. *New York Times* was decided by a unanimous Court, the only disagreement being whether core political speech should be accorded a qualified privilege or an absolute privilege.[3]

The *New York Times case* was decided, as the Supreme Court expressed it, "against the background of a profound national

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[3] Justice Hugo Black was of the opinion that the First Amendment granted an absolute privilege. 376 U.S. at 293 (Black, J., with whom Douglas, J., joined, concurring specially).

commitment to the principle that debate on public issue should be *uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks upon government and public officials.*" 376 U.S. at 270 (emphasis added). Considering the Supreme Court's review, in *New York Times*, of the history of the First Amendment, it is clear to me that the Court came ever so close to holding that political speech, even speech that is false and defamatory, as it was in that case, has *absolute protection* under the First Amendment. I recognize, of course, that the Court did not hold that political speech is absolutely privileged, but the Court did severely narrow the scope of the traditional categorical exception that had applied when defamatory speech was involved. The narrowness of this defamation exception was just recently commented upon by the current Supreme Court in a case involving the constitutionality of a so-called "hate crime" statute. *R.A.V. v. City of St. Paul, Minnesota* [Ms. 90-7675, June 22, 1992], ___ U.S. ___ (1992).[4]

The broad scope of the protection offered for political speech by *New York Times* and the narrowness of the defamation exception is shown by the following quote from that opinion:

> "In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, *and even to false statement*. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long

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[4] In *R.A.V. v. City of St. Paul*, the majority stated: "Our decisions since the 1960's have narrowed the scope of the traditional categorical exceptions for defamation, see *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); see generally *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 13-17 (1974)."

> view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."

376 U.S. at 254, at 271, quoting from *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940) (emphasis added).

New York Times involved the publication of a newspaper advertisement that contained false statements about the police commissioner of Montgomery, Alabama. The purpose of the advertisement was to raise money, but the Supreme Court found that the advertisement was core political speech that was the very heart of the First Amendment. Political speech is still protected today and occupies the top position in the hierarchy of protected speech.[5]

Political speech involving public officials, *especially that made during political campaigns*, seems to be especially protected. To emphasize the First Amendment protection afforded core political speech, and the toughness required of those whose reputations or feelings may be affected by it, the Supreme Court, in *New York Times*, used as an example speech that was critical of a judge. The Court, citing and quoting from one of its prior cases involving criticism of a judge, said that "[i]f judges are to be treated as 'men of fortitude, able to thrive in a hardy climate,' *Craig v. Harney, supra*, 331 U.S. at 376. 67 S.Ct., at 1255. 91 L.Ed. at 1546, surely the same must be true of other government officials such as elected city commissioners." 376 U.S. at 273. As a footnote to this statement in its opinion, the Court noted that political speech and politicians have always operated in a different environment, and strongly

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[5] In *R.A.V. v. City of St. Paul*, Justice Stevens, in a special concurrence, stated that "speech about public officials or matters of public concern receives greater protection than speech about other topics." ___ U.S. at ___, 1992 WL 135564, *23 (Stevens, J., concurring in the judgment, by separate opinion, in which, White, J. and Blackmun, J. also concurred). Justice Stevens further stated that "[o]ur First Amendment decisions have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position; commercial speech and obscene, sexually explicit speech are regarded as a sort of second-class expression; obscenity and fighting words receive the least protection of all."

suggested that political speech in political campaigns is different in nature from other forms of speech:

> "The climate in which public officials operate, especially during a political campaign, has been described by one commentator in the following terms: 'Charges of gross incompetence, disregard of the public interest, communist sympathies, and the like usually have filled the air: and hints of bribery, embezzlement, and other criminal conduct are not infrequent.' Noel, Defamation of Public Officers and Candidates, 49 Col.L.Rev. 875 (1949).
>
> "For a similar description written 60 years earlier, see Chase, Criticism of Public Officers and Candidates for Office, 23 Am.L.Rev. 346 (1889)."

376 U.S. at 274.

Based on the foregoing, I can only conclude that the majority has ignored the teachings of *New York Times* that public officials and political candidates, especially in political campaigns, should be "men [and women] of fortitude" and should not expect to be protected from the "hardly climate" of the public arena.

I must also disagree with other aspects of the majority opinion. The majority holds that "Taking the television commercial in its entirety, this Court holds that the television commercial was reasonably capable of a defamatory meaning." To make this finding, the Court must engage in a laboratory analysis of the commercial and decide that the words "as a reward" are defamatory. In my opinion, the parties in their briefs, and the Court, at oral argument, spent too much time trying to analyze what these three words meant. The fact that so much analysis and discussion revolved around the meaning of the commercial should be proof positive that the plaintiff has failed to offer proof, with "convincing clarity," that the commercial was so defamatory that it could receive no First Amendment protection. Why should core political speech suffer such close scrutiny as the Court has given this commercial?

Does the commercial lose its First Amendment protection if it is not completely true and if it hints of misconduct on the part of the plaintiff? I think not. I do not believe that political speech must suffer such close scrutiny on our part, or on the speaker's part. On the contrary, as the Supreme Court said in footnote 14 of *New York Times*, the climate in which public officials operate, *especially during a political campaign*, is a "hardly climate." "'Charges of gross incompetence, disregard of the public interest, communist sympathies, and the like usually have filled the air" and "hints of bribery, embezzlement, and other criminal conduct are not infrequent,'" notes the court. 376 U.S. at 273.

> "Our political history reeks of unfair, intemperate, scurrilous and irresponsible charges against those in or seeking public office. Washington was called a murder, Jefferson . . . insane . . . , Henry Clay a pimp, Andrew Jackson an adulterer, and Andrew Johnson and Ulysses Grant drunkards. Lincoln was called a half-witted usurper, a baboon, a gorilla, a ghoul. . . . Franklin Delano Roosevelt was castigated as a traitor to his country. Dwight D. Eisenhower was charged with being a conscious agent of the Communist conspiracy. [H]arsh criticism of politicians is] an unpleasant fact of our political background — a history of rough, crude, brawling, mud-slinging, muck-raking, name-calling attacks on those in or seeking political office."

Desert Sun Pub. Co. v. Superior Court, 97 Cal. App. 3d 49, 158 Cal. Rptr. 519, 521 (1979). See also *Clark v. Allen*, 415 Pa. 484, 204 A.2d 42, 44 (1964).

Even assuming that the plaintiff has shown that the television commercial contained a false statement and that it was defamatory, that does not entitle the plaintiff to a trial on the issues. "Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth — whether administered by judges, juries, or administrative officials — and especially one that

puts the burden of proving truth on the speaker." *New York Times v. Sullivan*, 376 U.S. at 271. In that case, the Court also said that "erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need * * * to survive." 376 U.S. at 271, 272. "The constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered." 376 U.S. at 271.

There is another reason why I think the trial judge properly entered the summary judgment in this case. The substance of the television commercial was not materially different from that of a newspaper account of the same facts. In fact, the record in this case shows that the defendant created the campaign commercial based, in part, upon information contained in two published articles, one describing the plaintiff as "an Alabama political operative" who had received over $700,000 in consulting fees, and the other an Associated Press story that ran in *The Montgomery Advertiser*, that read, in part, as follows:

> "Billy Joe Camp, former president of the Alabama Public Service Commission and a Democratic candidate for secretary of state, received more than $770,000 in consulting fees from Georgia Power Co. during a three year period, an Atlanta based newsletter reported Monday.
>
> ". . . .
>
> "As head of the Alabama PSC, Camp helped regulate Alabama Power Co. which — like Georgia Power — is a subsidiary of the Southern Co."

The Associated Press and the editors of *The Montgomery Advertiser* considered the receipt by Mr. Camp of over $770,000 from Georgia Power Company, the sister company of Alabama Power Company, a company that he had formerly regulated, to be newsworthy and of public interest. When I compare the news accounts with the television commercial, the implications and innuendos are basically the same — a former public service commissioner has received $770,000 from a sister com-

pany of a company he regulated when he was president of the PSC. But even assuming that the implications and innuendos of the television commercial and the news stories are different, does that mean that the television commercial is not the sort of "robust speech" that the Constitution of the United States protects in cases such as this where two political candidates are engaged in the "hardy climate" of a hotly contested political race? I believe that the television commercial was just the kind of protected political speech that the Supreme Court of the United States found to be protected in *New York Times*.

Also, I disagree with the majority because I think that the plaintiff has failed to sustain his burden of offering "clear and convincing" evidence that the defendant was guilty of "actual malice." The plaintiff presented no evidence from which a "reasonable factfinder could conclude ... that [he] ha[s] shown actual malice with convincing clarity." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 252. As I have already stated, if lawyers and judges have to spend as much time as we have spent trying to decide whether the commercial is true or false, then the burden of proving that it was defamatory with "convincing clarity" has clearly not been met. Let me make another point: Implicit in the majority's holding is a conclusion that the *Anderson* case involves federal procedural law, and that this Court is not bound by it. *Anderson* involved federal *constitutional law* that is applicable to Alabama, and it must be remembered that, in *New York Times*, there was a trial, there was a jury verdict for the plaintiff, and the Supreme Court said: "Applying these standards, we consider that the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands, and hence that it would not constitutionally sustain the judgment for respondent under the proper rule of law." 376 U.S. at 286.

When constitutional principles such as freedom of speech is involved, I do not believe that Alabama procedural rules, if they result in a continuing violation of a defendant's constitutional rights, would be sanctioned.

As the Supreme Court noted in *New York Times*, political speech, especially during a political campaign, can become quite "robust," but it is protected speech. Political speech in the "hardy climate" of public affairs is the very type of speech the framers of the First Amendment were most anxious to protect. While I realize that there is a narrow category of defamatory speech that the Constitution of the United States does not protect, I fail to see how the television commercial here fits in that category.

The opinion today will have a "chilling effect" upon the right of political candidates, and others, to freely comment and express opinions on candidates and great public issues for fear of being hailed into court and charged with defamation. That is regrettable.

I would affirm the judgment of the trial court, even though it is a summary judgment, because I believe the plaintiff has failed to show that he can prove by clear and convincing evidence that the defendant's speech was not protected by the First Amendment. I firmly believe that the holdings in *New York Times* and *Anderson v. Liberty Lobby, Inc.*, compel such a result.

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

BILLY JOE CAMP,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION NO.
vs.	)	
	)	CV-90-8590
WILLIAM N. YEAGER, JR., et al.,	)	
	)	
	)	
Defendants.	)	

ORDER ON MOTION FOR SUMMARY JUDGMENT

This matter is before the Court on defendants, William N. Yeager, Jr.,'s and Timbes and Yeager, Inc.'s, Motion for Summary Judgment, having been argued, submitted and taken under consideration. The court has taken into consideration the pleadings, affidavits and depositions and has reviewed a videotape of the television advertisement in issue.

It is established without dispute that the television advertisement or spot at issue sets forth facts which had been distributed by Associated Press and published by at least one newspaper in Alabama, *The Montgomery Advertiser*. The same information had appeared in a publication in the State of Georgia, known as *Bill Shipp's Georgia*. This information set forth payments by Georgia Power Company, an affiliate of Alabama Power Company, to plaintiff. It is undisputed that defendant Yeager relied upon this published information in formulating the television spot.

Prior to the television ad at issue, the facts stated in that ad were clearly in the public domain and plaintiff has not challenged the substantial accuracy of those facts. Plaintiff con-

tends that the fees in question were paid to plaintiff's company, rather than plaintiff, but this distinction does not prevent, for libel purposes, the facts stated from being substantially correct.

The television ad also cites rate increases granted by the Alabama Public Service Commission during plaintiff's tenure as Chairman of the Commission. Although the plaintiff contends that he did not personally vote for the increases, there has been no challenge to the substantial accuracy of these statements, which reflect matters of public record. The television ad restates those facts and then draws the conclusion that the fees were paid "as a reward" for the rate increases during plaintiff's tenure on the Public Service Commission. The court finds that "as a reward" is a conclusion to be drawn from the facts stated, and, as such, on the facts here presented cannot be the basis of a recovery by plaintiff for libel. *See Restatement (Second) of Torts*, § 566; *Anderson v. The Uniroyal-Goodrich Tire Co.*, CV88-P-0448-W (N.D. Ala. Jan. 10, 1990) (Pointer, J.). Moreover, the phrase "as a reward" is ambiguous and susceptible to different meanings, and is not capable of being proven true or false by objective evidence. *Milkovich v. Lorain Journal Co.*, 497 U.S. ___, 111 L. Ed. 2d 1, 110 S. Ct. 2695 (1990).

In addition, the plaintiff in this case has not disputed that he is a "public figure" under *New York Times v. Sullivan*, 376 U.S. 254 (1964) and its progeny. Defendant Yeager's testimony that he believed that his conclusion was truthful is not controverted. In dealing with publication about a public figure, constitutional malice must be shown. That the defendant made a mistake in interpreting documents or events is insufficient to prove constitutional malice. *Time, Inc. v. Pape*, 401 U.S. 279 (1971). Where the evidence is without dispute that Yeager believed the statements and opinions in the television spot, and relied in making them upon articles carried by the Associated Press, no showing can be made by "clear and convincing evidence" that the statements were made with knowledge of their falsity or reckless disregard as to their truth or falsity. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984).

Accordingly, it is hereby Ordered, Adjudged, and Decreed that the Motion of defendants William N. Yeager, Jr. and Timbes & Yeager, Inc. for Summary Judgment be and the same is hereby granted. The Court finds that there is no just reason for delay and this judgment in favor of defendants William N. Yeager, Jr. and Timbes and Yeager, Inc., is hereby made final pursuant to Rule 54(b) of the Rules of Civil Procedure.

Done this the 4 day of Oct., 1991.

/s/ Claude Hughes

CIRCUIT JUDGE

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

BILLY JOE CAMP,	*	
	*	
Plaintiff,	*	
	*	CIVIL ACTION NO.
vs.	*	
	*	CV90 8590
WILLIAM N. YEAGER, JR.	*	
TIMBES & YEAGER, INC., PERRY	*	
HAND, JACK EDWARDS, and	*	
FICTITIOUS DEFENDANTS A, B & C,	*	
those persons, firms, or entities	*	
responsible for producing, writing,	*	
or otherwise responsible for the	*	
content of the television ad	*	
produced and published at the	*	
request of the Perry Hand Campaign	*	
whose identities are unknown to	*	
Plaintiff at this time but whose true	*	
and correct names will be added by	*	
amendment when ascertained,	*	
	*	
Defendants	*	

COMPLAINT

1. Plaintiff, BILLY JOE CAMP, is the Democratic nominee for Secretary of State subject to the November, 1990, General Election and is a resident of Montgomery County, Alabama.

2. Defendant WILLIAM N. YEAGER, JR. is over the age of nineteen (19) years and is a resident of Mobile County, Alabama.

3. Defendant TIMBES & YEAGER, INC. is an Alabama corporation with its principal place of business in Mobile, Alabama.

4. Defendant PERRY HAND is the Republican nominee for Secretary of State and is a resident of Montgomery County, Alabama.

5. Defendant JACK EDWARDS is over the age of nineteen (19) years and is a resident of Baldwin County, Alabama. JACK EDWARDS is the Chairman of the PERRY HAND Campaign.

6. Fictitious Defendants A, B & C, are the persons, firms or entities responsible for producing, writing, or otherwise responsible for the content of the television ad produced and published at the request of the PERRY HAND Campaign. The identities of said Fictitious Defendants are unknown to the Plaintiff at present, but will be substituted by amendment when the identities of the fictitious defendants are ascertained.

COUNT I

7. Plaintiff claims that each of the previously named Defendants was involved in producing, writing, or is otherwise responsible for the content of a television commercial produced at the request of the PERRY HAND Campaign, the Republican candidate for Secretary of State. Plaintiff alleges that the Defendants maliciously produced and caused to be published a television commercial which aired on WBRC Channel 6 Television, a TV station in Jefferson County, Alabama, and said ad aired beginning on October 2, 1990, and was republished through October 8, 1990, on the aforementioned television station as well as other television stations throughout the State of Alabama. The content of said ad was as follows:

> "When Billy Joe Camp was President of the Public Service Commission, we got hit with three rate increases. As a reward, Georgia Power paid him over $700,000 in consulting fees."

8. The above quoted statement was false, and the Defendants knew that said statement was false, or the Defendants made said statement with reckless disregard for whether it was false or not. Plaintiff further alleges that the Defendants responsible for the publication of said statement acted with actual malice.

9. The published ad, when construed according to the natural and probable effect upon the mind of the average lay person, is such that they would believe that Billy Joe Camp has committed an indictable offense and/or is guilty of public corruption. As such, the ad is libelous per se.

10. As a proximate consequence of the aforementioned defamatory statement, Plaintiff has sustained the following injuries and damages:

(a) The reputation of the Plaintiff has been irreparably harmed;

(b) Plaintiff has undergone emotional distress and mental anguish and will continue to undergo such emotional distress and mental anguish in the future;

(c) Plaintiff claims an award of punitive damages against each of the Defendants.

WHEREFORE, Plaintiff demands judgment against each of the aforementioned Defendants, separately and severally, for damages in the amount of Ten Million and no/100 ($10,000,000.00) Dollars, plus interest and all costs of this proceeding.

COUNT II

11. Plaintiff realleges and repeats all of the previous allegations of his complaint.

12. Plaintiff claims damages from each of the previously mentioned Defendants for maliciously publishing or maliciously causing to be published a television ad concerning the Plaintiff which aired on WBRC Channel 6 TV, a television station in Jefferson County, Alabama. Said ad was published beginning on October 2, 1990 and ending on October 8, 1990, which contained the following statement:

> "When BILLY JOE CAMP was President of the Public Service Commission, we got hit with three rate increases (at this point on the electronic screen there was flashed up $389,000,000). As a reward, Georgia Power paid him over $700,000 (on the television screen there is shown the number $770,000) in consulting fees."

13. The above statement was false, and the Defendants knew said statement was false, or the Defendant made said statement with reckless disregard of the truth.

14. The published ad, when construed according to the natural and probable effect upon the mind of the average lay person, subjects the Plaintiff to disgrace, ridicule, and/or contempt, and said publication is false and was made maliciously.

15. As a proximate consequence of the aforementioned defamatory statement, Plaintiff has sustained the following injuries and damages:

(a) The reputation of the Plaintiff has been irreparably harmed;

(b) Plaintiff has undergone emotional distress and mental anguish and will continue to undergo such in the future;

(c) Plaintiff claims punitive damages from each of the Defendants.

WHEREFORE, Plaintiff demands judgment against each of the Defendants, separately and severally, for damages in the amount of Ten Million and no/100 ($10,000,000.00) Dollars, plus interest and all costs of this proceeding.

/s/ Ted Taylor
Ted Taylor

/s/ Jerry D. Roberson
Jerry D. Roberson,
Attorneys for Plaintiff,
Billy Joe Camp

OF COUNSEL:
TAYLOR & ROBERSON
2112 First Avenue North
Birmingham, Alabama
(205) 323-3300

PLAINTIFF DEMAND A TRIAL BY STRUCK JURY IN THE ABOVE-STYLED CASE.

Defendants may be served by Certified Mail Return Receipt Requested at the following:

WILLIAM N. YEAGER, JR.
c/o Timbes & Yeager, Inc.
263 No. Conception
Mobile, Alabama 36603

TIMBES & YEAGER, INC.
William N. Yeager, Jr., Registered Agent
263 No. Conception
Mobile, Alabama 36603

PERRY HAND
Secretary of State
208 Alabama State House
Montgomery, Alabama 36130

JACK EDWARDS
Campaign Chairman
Perry Hand for Secretary of State
P. O. Box 23545
Montgomery, Alabama 36123